

October 8, 2013

Carey Haughy
Vice President, Geologist
Blue Mountain Minerals
24599 Marble Quarry Road
Columbia, CA 95310

Re: Your Request for Informal Assistance
Our File No. I-13-122

Dear Ms. Haughy:

This letter responds to your request for informal advice on behalf of yourself and another member of the Tuolumne County Biological Resources Ad-Hoc Committee (the “Committee”) regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”)¹ and is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Because you seek general guidance, we are providing informal assistance, rather than formal advice. Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).) Also, please note our advice is based solely on the provisions of the Act. We offer no opinion on the applicability, if any, of other conflict-of-interest laws such as common law conflicts of interest or Section 1090. We urge you to check with the county counsel’s office to determine whether any other laws are applicable in light of the facts you present.

QUESTION

Does the Act prohibit you or Diane Moore from serving as members of the Committee?

CONCLUSION

A public official’s membership on a board, committee, or commission is not, of itself, prohibited under the Act. Moreover, under your facts, the ad hoc committee does not now

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

possess decisionmaking authority, so the Act's conflict of interest and financial disclosure rules do not currently apply to its members. However, if in the future the committee gains decisionmaking authority, when you and Ms. Moore are called upon to participate in a decision to make recommendations to the Tuolumne County Board of Supervisors that may have an effect on your financial interests, you might have a disqualifying conflict of interest that would prevent you from participating in the decision, as discussed below.

FACTS

You and Ms. Moore are appointed members of the Committee, which includes members of the Board of Supervisors and unelected individuals that are appointed by the Board of Supervisors.

The Committee was formed by the Board of Supervisors to consider and make recommendations for amending the biological resource section and the oak woodland policies of the Conservation and Open Space Element of the county's General Plan. The Board of Supervisors is not obligated to follow or act upon any of the Committee's recommendations. No decision of the Committee will be binding on any person or entity. The Committee is newly formed and has not yet made any recommendations to the Board of Supervisors.

You are employed by Portola Minerals Company ("PMC") dba Blue Mountain Minerals. PMC has a pending application before the county to amend its Conditional Use Permit 02CUP-56 and Reclamation Plan 02REC-01. PMC anticipates that it will be applying for new permits and amendment of its existing permits. Any changes in the law implemented as a result of the Committee's recommendations may affect PMC's applications.

PMC has engaged Ms. Moore as an environmental consultant in connection with its pending application to amend a permit. Ms. Moore regularly practices in Tuolumne County and her clients routinely use her services to assist in complying with environmental laws in connection with pending applications in the county. She, too, may benefit from changes implemented by the Board of Supervisors resulting from the Committee's recommendations.

ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials will "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. A conflict of interest exists whenever a public official makes, participates in or uses his or her official position to influence a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her interests as specified by Section 87103.

The threshold inquiry in determining whether you or Ms. Moore has a conflict of interest is whether you, as members of the Committee, are “public officials” and, in that capacity, will be making, participating in making, or influencing a governmental decision.

Section 82048 defines “public official” as every member, officer, employee or consultant of a state or local government agency. The term “public official” is further defined by Regulation 18701(a)(1):

“(a) For purposes of Government Code section 82048, which defines ‘public official,’ and Government Code section 82019, which defines ‘designated employee,’ the following definitions apply:

(1) “Member” shall include, but not be limited to, salaried or unsalaried members of committees, boards or commissions *with decisionmaking authority*.

(A) A committee, board or commission possesses decisionmaking authority whenever:

- (i) It may make a final governmental decision;
- (ii) It may compel a governmental decision; or it may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto that may not be overridden; or
- (iii) It makes substantive recommendations that are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency.”

“(B) A committee, board, or commission *does not possess decisionmaking authority* under subsection (a)(1)(A)(i) of this regulation if it is formed for the sole purpose of researching a topic and preparing a report or recommendation for submission to another governmental body that has final decisionmaking authority.” (Emphasis added.)

Thus, there are three ways that a committee, board or commission may be deemed to have decisionmaking authority: when it makes a final decision, can compel or prevent a decision, or makes substantive recommendations that are, over an extended period of time, regularly approved without significant amendment or modification. If the Committee meets any of these tests, it possesses decisionmaking authority, and its members would be considered public officials who are subject to the Act’s conflict-of-interest rules and financial disclosure requirements. Alternatively, if the Committee does not have decisionmaking authority under

Regulation 18701(a)(1), the Committee's members are not considered public officials under the Act and are not subject to the Act's conflict-of-interest rules and financial disclosure requirements solely by virtue of their membership on the Committee.²

You indicate that the Committee is purely an advisory committee whose task is to provide recommendations to the Board of Supervisors regarding the Conservation and Open Space Element of the county's General Plan. The Board of Supervisors is not obligated to follow or act upon any of the Committee's recommendations and makes all final decisions. No decision of the Committee will be binding on any person or entity. Under these circumstances, the Committee does not make final decisions, nor is it empowered to compel or prevent governmental decisions.

In order to determine whether the Committee has decisionmaking authority under Regulation 18701(a)(1)(A)(iii), we must examine whether the Committee makes substantive recommendations that, over an extended period of time, have been regularly approved without significant amendment or modification. If there is a history of a particular advisory body's recommendations being regularly accepted without amendment or modification, often referred to as "rubber stamping," the body converts from a solely advisory function to one of making or participating in the making of a governmental decision, and its members are considered public officials subject to the Act's conflict-of-interest provisions. As a new body with no history of rubber stamping, the Committee does not have decisionmaking authority under this provision.

Because the Committee does not currently have decisionmaking authority, you and Ms. Moore are not prohibited from participating in Committee decisions to make recommendations to the Board of Supervisors. If, however, in the future, the Committee's powers or authority are changed, or the Committee's recommendations are regularly approved by the Board of Supervisors, you will need to revisit the question of whether the Committee has decisionmaking authority that would cause its members such as you and Ms. Moore to become subject to the Act's conflict-of-interest and financial disclosure provisions.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl

² Obviously, public officials, such as members of the Board of Supervisors or other current public officials who serve on the Committee in their current capacities as public officials, remain subject to the Act's conflict of interest provisions when participating in the Committee's business.